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No. 75-1833

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States
OCTOBER TERM, 1976

CHARLES MEYERS and JACK SCOVILLE, PETITIONERS

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. C) is reported at 529 F. 2d 1033. The order of the district court (Pet. App. B) is reported at 395 F. Supp. 1067.

JURISDICTION

The judgment of the court of appeals was entered on February 12, 1976. A petition for rehearing was denied on May 21, 1976 (Pet. App. D). The petition for a writ of certiorari was filed on June 21, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a candidate for public office, by corruptly agreeing to take money in exchange for his future

official acts in the awarding of public contracts, commits the Hobbs Act offense of conspiring to affect commerce by "the obtaining of property from another, with his consent, induced *** under color of official right" (18 U.S.C. 1951(b)(2)).

STATEMENT

In a one count indictment returned in the United States District Court for the Eastern District of Illinois, petitioners were charged with having conspired to affect commerce by extortion, in violation of the Hobbs Act, 18 U.S.C. 1951 (Pet. App. A). Prior to trial, the district court granted petitioners' motion to dismiss the indictment (Pet. App. B). On the government's appeal, the court of appeals reversed and remanded the case for trial (Pet. App. C).

For purposes of the motion to dismiss the indictment, the parties stipulated (Pet. App. E) that petitioners were candidates for the office of Trustee of the East Side Levee and Sanitary District in East St. Louis, Illinois, having obtained the nomination as a result of a primary election held in March 1972. Both petitioners were elected to that office in November 1972 and assumed their public duties in December 1972. Neither petitioner was a public office holder prior to December 1972.

The indictment alleged that from September 1972 until January 1973 petitioners conspired "to affect commerce by obtaining property of another, with his consent, induced under color of official right" (Pet. App. A1-A2). It alleged that petitioners conspired with others "to obtain in excess of \$6,000.00, individually, that [petitioners] were not entitled to, in consideration for their future official acts as trustees *** so that [petitioners] would suspend their independent and unbiased judgment on the merits when considering the awarding of contracts" (Pet. App. A2).

The parties stipulated that the conspiracy was formed, and the payments alleged in the indictment were made, if at all, in October 1972 (Pet. App. A19). It was also stipulated that, if such payments were made, petitioners retained the money through May 1973, after they had taken office (*ibid.*).

The district court granted petitioners' motion to dismiss the indictment, holding that "[a] mere candidate for public office cannot obtain property from another with that person's consent induced under color of official right" (Pet. App. A7).

The court of appeals reversed and remanded for the purpose of reinstating the indictment. It held that, "within the meaning of the Hobbs Act, it is a crime for candidates for political office to conspire to affect commerce by extortion induced under color of official right during a time frame beginning before the election but not ending until after the candidates have obtained public office" (Pet. App. A12)—*i.e.*, where "[t]he object of the conspiracy [is] not the suspension of the unbiased judgment of a private individual, but *** the suspension of the unbiased judgment of a [future] public official," to be exercised after he takes office (Pet. App. A14). "Meyers and Scoville are charged with having sold the *de jure* power which they would acquire in the future. *** We think that it is no less of a crime under the Hobbs Act to sell one's public trust before, rather than after, one is installed in public office" (Pet. App. A16-A17).

ARGUMENT

1. This petition challenges the court of appeals' reversal of the district court's pretrial dismissal of the indictment. That reversal puts petitioners in the same position as if the district court had ruled against them in the first instance, a ruling that would not have been

subject to interlocutory appeal. *United States ex rel. Rosenberg v. United States District Court*, 460 F. 2d 1233 (C.A. 3); *United States v. Garber*, 413 F. 2d 284 (C.A. 2).

Although this Court has jurisdiction of the case, even at this interlocutory stage, this is not a situation in which "any review by this Court *** must be immediate to be meaningful." *Federal Power Commission v. Trans-continental Gas Pipe Line Corp.*, 423 U.S. 326, 331. On the contrary, if petitioners are tried and acquitted, the issue they tender here will not require final resolution in this case. If, on the other hand, they are convicted in the district court and their convictions are affirmed by the court of appeals, they will be free to present their contentions to this Court at that time in a fresh petition for a writ of certiorari raising the same issue as the one presented here.

In these circumstances, it would be appropriate for the Court to deny the present petition regardless of the merit it might have were the issue ripe for review after a final judgment. See *Brotherhood of Locomotive Firemen v. Bangor & Aroostook Railroad Co.*, 389 U.S. 327.

2. In any event, the decision of the court of appeals is correct, and further review is not warranted.

Petitioners concede that the Hobbs Act would be applicable if, at the time they agreed to take money in return for suspending their unbiased judgment in awarding public contracts, they had already assumed their official duties (Pet. 5-6). Their sole contention is that only a person who holds public office can induce another's consent "under color of official right." But nothing in the words or the purpose of the statute compels that result.

The Hobbs Act provision at issue was intended, in part, to prohibit extortion by the threatened or promised misuse of the public trust. The conduct alleged in the indictment is no less extortionate merely because petitioners were trading on their expected future public trust rather than an existing public trust. Although the "official right," under color of which petitioners allegedly extorted the payment of money, was contingent upon their election, that is a difference only in degree, not in kind. The extortion alleged in the indictment could not have succeeded but for the expectation that petitioners would be in a position to make or influence official decisions concerning awards of public contracts. "So long as the motivation for the payment focuses on the recipient's office, the conduct falls within the ambit of 18 U.S.C. §1951." *United States v. Braasch*, 505 F. 2d 139, 151 (C.A. 7), certiorari denied, 421 U.S. 910.

The court of appeals thus correctly held that "it is no less of a crime under the Hobbs Act to sell one's public trust [or to conspire to do so] before, rather than after, one is installed in public office" (Pet. App. A17).¹

¹Neither *United States v. Kenny*, 462 F. 2d 1205, 1229 (C.A. 3), certiorari denied *sub nom. Kropke v. United States*, 409 U.S. 914, nor *United States v. Crowley*, 504 F. 2d 992, 994-995 (C.A. 7), aids petitioners' argument. Those decisions merely reject the contention that it is necessary to prove extortion both by fear *and* under color of official right in order to establish a violation of the Hobbs Act by a public official.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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